Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1179

UNITED STATES OF AMERICA,

Petitioner,

v.

MITCHELL MILLER,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

D.L. RAMPEY, JR.
Nunn, Geiger, Rampey,
Buice & Harrington
P.O. Drawer 520
Warner Robins, Georgia 31093
Attorney for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

STATEMENT OF CASE 1

ARGUMENTS 3,12,15

CONCLUSION 16

TABLE OF AUTHORITIES

Cases:

Adickes v. Kress & Co., 398 U.S. 144 (1970) 11

Anneberg v. Roberts, 333 Pa. 203, 2 A.2d 612 (1938) 9

Barrows v. Jackson, 346 U.S. 294 (1952) 6

Biederman's of Springfield v. Wright, 322 S.W.2d 892 (Mo. 1959) 7

Boyd v. United States, 116 U.S. 616 (1886) 3,5,12

Burdeau v. McDowell, 256 U.S. 465 (1921) 10

Burke v. Wilmington Parking Authority, 365 U.S. 715 (1961) 11

Bumper v. North Carolina, 391 U.S. 543 (1968) 14

Burrows v. Superior Court of San Bernadino County, 529 P.2d 590 (1875) 8,9

Byars v. United States, 273 U.S. 28 (1927) 10

California Banker's Association v. Schultz, 94 S.Ct. 1494 (1974) 4,9,14,15

City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259 (1970) 7

Corngold v. United States, 367 F.2d 1 9th Cir. 66 10,14

Entick v. Carrington, 19 How. St. Tr. 1029 (C.P. 1765) 5

Hale v. Henkel, 201 U.S. 43, 76 (1906) (Subpoena duces tecum) 3,12

Hecht v. Pro-Football, Inc., 46 F.R.D. 605, 607 (D.D.C. 1969) 7

Page

Katz v. United States, 389 U.S. 347, 361 (1967) 6,7,8

Lustig v. U.S., 338 U.S. 74, 78 (1941) 10

McMann v. Securities and Exchange Comm'n, 87 F.2d 377, 379 (2d Cir. 1937) 3

Mancusi v. DeForte, 392 U.S. 364 (1968) 5,9,14

Milohnich v. First National Bank, 224 So.2d 759 (Fla. Ct. App. 1969) 7

Oklahoma Press Publ. Co. v. Walling, 327 U.S. 18 186, 214-16 (1946) (Subpoena duces tecum) 3

Peterson v. Idaho First National Bank, 83 Idaho 578, 367 P.2d 284 (1961) 7

Pollard v. Roberts, 283 F. Supp. 248 aff'd per curiam, 393 U.S. 14 (1968) 6

Reitman v. Mulkey, 387 U.S. 369 (1967) 11

See v. City of Seattle, 387 U.S. 541, 545 (1967) 3

Silverthorne Lumber Co. v. U.S., 251 U.S. 385 4,5,10,12

Sparks v. Union Trust Co., 256 N.C. 478, 124 S.E.2d 365 (1962) 7

Stoner v. California, 376 U.S. 483 (1964) 10,14

Terry v. Ohio, 392 U.S. 1 (1968) 16

Trammel v. Citizens News Co., 285 Ky. 529, 148 S.W.2d 708 (1941) 7

United States v. First National Bank of Mobile, 67 F. Supp. 616 (S.D. Ala. 1946) 7

United States v. Jeffers, 342 U.S. 48 (1951) 10

United States v. Morton Salt Co., 338 U.S. 632, 651-52 (1950) 3

United States v. United Mine Workers, 330 U.S. 258, 284-288 (1947) 10

United States v. United States District Court, 407 U.S. 297 (1973) 13,15

United States v. White, 401 U.S. 745, 752 (1971) 6

Page

Wallace and Tierran Company, 76 F. Supp. 215 (D.C.R.I. 1948) 12

Constitution:

United States Constitution:
Fourth Amendment ..... *passim*

Miscellaneous:

10 Am. Jur. 2d, *Banks* 3332 6

Balin, Banks Ordinarily Cooperate with IRS on Tax Examination of Customers, 14 J. Tax 220 (1961); 118 Cong. Rec. 10828-33 (Daily Ed. June 30, 1972) 14

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BRIEF FOR THE RESPONDENT

STATEMENT OF CASE

The Respondent does not substantially disagree with the basic Statement of the Case set forth by the government, but feels compelled to point out certain factual matters in the record which are relevant to issues presented herein.

One of the two subpoenas duces tecum served was served on the C & S of Warner Robins (formerly The

Bank of Warner Robins) and was not served on The Citizens and Southern National Bank. (App. 23-25, 34) The subpoenas in question were not requested by Treasurer agents, but were received by the ATF agent at the United States Attorney's office from a secretary. (App. 45) On the day of the hearing on the Respondent's Motion to Suppress, April 18, 1973, the ATF agent still had possession of the original copy of the subpoena and had filled in the information on the return. The agent also had possession of the checks and paperwork received from the banks. (App. 41)

An employee of the C & S Bank of Warner Robins testified that in August of 1972 the bank began microfilming all personal checks and that prior to that time, everything was not microfilmed. (App. 36) For example, checks received across the counter were microfilmed and some microfilming was done somewhere along the way in the collection process. (App. 38) In order to retrieve the Respondent's checks, she and the agents had to hunt through each roll of film for a day's work and look at other people's checks in addition to his in order to find the checks in question. (App. 36-37)

At the Bank of Byron, the ATF agent was allowed to sit in front of a Recordak machine and simply look through the checks and pick out the particular checks of interest. (App. 39-40)

I.

A BANK DEPOSITOR HAS A PROTECTABLE FOURTH AMENDMENT INTEREST IN BANK RECORDS OF HIS ACCOUNT AND REASONABLY EXPECTS INFORMATION THEREIN TO REMAIN PRIVATE.

The right to be secure in one's papers has been applied in a long and unbroken line of this Court's decisions to the compulsory production of one's books and records. See, e.g., *Boyd v. United States*, 116 U.S. 616 (1886) (court order to produce invoice), in which this court held that:

> . . . a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient and effects the sole object and purpose of search and seizure. 116 U.S. at 622.

Accord: *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (subpoena duces tecum); *Oklahoma Press Publ. Co. v. Walling*, 327 U.S. 186, 214-16 (1946) (subpoena duces tecum); *United States v. Morton Salt Co.*, 338 U.S. 632, 651-52 (1950) (administrative order to report based upon statute); *See v. City of Seattle*, 387 U.S. 541, 545 (1967) (discussion of administrative subpoenas). See also *McMann v. Securities and Exchange Comm'n*, 87 F.2d 377, 379 (2d Cir. 1937) (L. Hand, J.).

What is sought to be protected here is one's bank accounts, "(f)or they mirror not only one's finances but his interest, his debts, his way of life, his family and his

civic commitments . . ." as well as ". . . a citizen's activities, opinion, and beliefs. . . ." *California Banker's Association v. Shultz*, 94 S.Ct. 1494, 1531 (1974)

The government is correct in recognizing in the ruling below the "notion" (Ptnr's Brief p. 18) that the government has circumvented the traditional Fourth Amendment protection accorded a person's private papers. In *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 a corporation's private papers were unlawfully acquired from its offices, copied by the District Attorney and later returned pursuant to a court order to the corporation. Thereafter, subpoenas to produce the originals were then served on the corporation for production of the originals which was refused. It was observed that "thus the case is not that of knowledge acquired the wrongful act of a stranger, but it must be assumed that the government planned and at all events ratified the whole performance." *Id.* at 391. The arguments of the government that it could avail itself of the knowledge obtained by the above means which otherwise it would not have had was soundly rejected. To do otherwise, would ". . . reduce the Fourth Amendment to a form of words". *Id.*

The interaction of the record keeping requirements of the Bank Secrecy Act, the purpose of which is acknowledged by the Petitioner to be expressly designed to insure that banks maintain adequate records that could be useful in criminal investigations (Ptnr's Brief p. 19, 33) plus the use of invalid grand jury subpoenas duces tecum to avoid the Fourth Amendment protection of private papers is evident here. It was noted in *California Banker's Association, supra.* at page 1501 that certain larger banks had abolished or limited the practice of photocopying checks, drafts and other

documents presented for payment in that Congress recognized that such records are not always automatically available for law enforcement purposes. In the case *sub judice*, The C & S Bank of Warner Robins never had microfilmed checks in the manner required by the act.

The Fourth Amendment is historically rooted in a concern for control over personal and private information in the face of governmental demands for access and use. See *Entick v. Carrington*, 19 How. St. Tr. 1029 (C.P. 1765); *Boyd, supra; Silverthorne, supra.* Here the admitted goal of the Bank Secrecy Act is the anticipatory recording and perpetuation of detailed financial information on bank depositor's accounts for *future* use against some bank depositors in possible criminal investigations.

The copies of checks and materials secured by illegal subpoena duces tecum herein were not made and maintained for the convenience and business purposes of the bank, but in fact of the civil and criminal compulsion of the Bank Secrecy Act. These copies should be accorded the same dignity as the original checks and materials returned to the depositor to insure the respondent's continuing right to privacy and right to be free of unreasonable searches and seizures under the Fourth Amendment. *Cf. Silverthorne, supra.* Indeed, ownership and possession of documents is not always dispositive when one's constitutional rights under the Fourth Amendment are at issue. In *Mancusi v. DeForte*, 392 U.S. 364 (1968), the Defendant was accorded standing to contest the seizure of certain union documents, from an office area shared by him, which did not belong to him after the service of a subpoena duces tecum on the local union.

It has also been recognized that the salutary rule of standing, which is a rule of practice must give way where there is a likelihood that there might be a denial of constitutional rights to individuals and in which it would be difficult if not impossible for the persons whose rights are asserted to preserve their rights. *Barrows v. Jackson*, 346 U.S. 294 (1952) See also *Pollard v. Roberts*, 283 F.Supp. 248 (E.P.D. Ark.), aff'd *per curiam*, 393 U.S. 14 (1968). It has recently been recognized that analysis of ownership, property rights and possessory interests in the determination of Fourth Amendment rights has been severely impeached by recent cases. *Katz, supra.*

It is submitted that "(o)ur problem, in terms of the principles announced in *Katz* is what expectations of pricacy [sic] are constitutionally 'justifiable'—what expectations the Fourth Amendment will protect in the absence of a warranty". *United States v. White*, 401 U.S. 745, 752 (1971). It is argued here that bank customers have a constitutionally justifiable expectation of privacy in the documentary details of the financial transactions reflected by their bank accounts.

It is hornbook law[1] that bank customers may expect their banks to treat their financial affairs as confidential. "The right of privacy and the right to keep

[1] . . . it is an implied term of the contract between the banker and his customer that the banker will not divulge to third persons without the consent of the customer, express or implied, either the state of the customer's account or any of his transactions with the bank, or any information relating to the customer acquired through the keeping of his account, unless the banker is compelled to do so by court order, the circumstances give rise to a public duty of disclosure, or the protection of the banker's own interests requires it. 10 Am. Jur. 2d, *Banks* 3332.

confidential one's financial affairs is well recognized." *Hecht v. Pro-Football, Inc.* 46 F.R.D. 605, 607 (D.D.C. 1969). In perhaps the leading case, the California Supreme Court struck down as a violation of the constitutional right to privacy a statute requiring the disclosure by public officials of financial interest exceeding $10,000. *City of Carmel-by-the-Sea v. Young*, 2 Cal. 3d 259 (1970).

Violation of that privacy by a bank has frequently been held to create a cause of action in contract. See e.g. *Milohnich v. First National Bank*, 224 So.2d 759 (Fla. Ct. App. 1969), and authorities cited; *Sparks v. Union Trust Co.*, 256 N.C. 478, 124 S.E.2d 365 (1962), *Peterson v. Idaho First National Bank*, 83 Idaho 578, 367 P.2d 284 (1961).

Even as between private parties, the public allegation of debt arising out of private financial transactions has been traditionally held to invade privacy, whether true or false. See, e.g. *Trammel v. Citizens News Co.*, 285 Ky. 529, 148 S.W.2d 708 (1941); *Biederman's of Springfield v. Wright*, 322 S.W.2d 892 (Mo. 1959), and cases cited.

Brex v. Smith, 104 N.J. Eq. 286, 146 A. 34 (1929), is particularly relevant here. In *Brex* the court enjoined a prosecutor from obtaining the bank records of all the city's policemen, holding that the depositors had a "property interest" in the information in their accounts and that the bank had "an implied obligation . . . to keep these [accounts] from scrutiny until compelled by a court of competent jurisdiction to do otherwise," See also *United States v. First National Bank of Mobile*, 67 F.Supp. 616 (S.D. Ala. 1946); *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

The Supreme Court of California has recently ruled that under Article 1, Sec. 13 of the California Constitution[2] that bank depositors have a constitutionally protected right against intrusions into the records of their banks. *Burrows v. Superior Court of San Bernadino County*, 529 P.2d 590 (1975). The court relied on this court's ruling in *Katz v. United States, supra.*

In regards to the rights to be protected, the court said

> "For all practical purposes, the disclosure by individuals or business firms of their financial affairs to a bank is not entire violitional, since it is impossible to participate in the economic life of contemporary society without maintaining a bank account. In the course of such dealings, a depositor reveals many aspects of his personal affaris, opinions, habits, and associations. Indeed, the totality of bank records provides a virtual current biography. While we are concerned in the present case only with bank statements, the logical extension of the contention that the bank's ownership of records permits free access to them by any police officer extends far beyond such statements to checks, savings bonds, loan applications, loan guarantees, and all papers which the customer has supplied to the bank to facilitate the conduct of his financial affairs upon the reasonable assumption that the information would remain confidential." *Burrows, supra* at 596.

Similarily, the Pennsylvania courts have held that a subpoena upon banks for records of depositors is a

[2] "The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches may not be violated. . . ."

search and seizure under the Fourth Amendment and the depositor had a right to intervene in court and challenge the subpoena. See *Annenberg v. Roberts,* 333 Pa. 203, 2 A.2d 612 (1938).

The *Burrows* court recognized that the depositor makes disclosures regarding his financial records and accounts to the bank for the limited purpose of facilitating the conduct of his financial affairs, not for the purpose of broadcasting publicly his financial background, the status of us his accounts or any other information regarding his affairs with the bank. Indeed, perfect and absolute privacy is not required in the determination and evaluation of the existence of a reasonable expectation of privacy as was the case in *Mancusi v. DeForte, supra.* The fact that DeForte shared an office with other union officers was not dispositive in upholding his Fourth Amendment rights as ". . . DeForte still could reasonably have expected that only those persons and their personal or business guests would enter the office and that the records would not be touched except with their permission or that of Union higher-ups." *Mancusi v. DeForte, supra,* at 367. In *California's Bankers Association v. Shultz,* it was recognized that "financial transactions can reveal much about a person's activities, associations and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy." *California Banker's Association,* 94 Sup. Ct. 1494, 1526 (concurring opinions of Justices Powell and Blackburn).

Finally, the petitioner argues that the Bank Secrecy Act did not create any protectable interest in behalf of depositors and that banks are not an agent of the government. The argument loses sight of the fact that

many banks are unwilling participants as well as other banks who had never recorded microfilm copies of depositor's checks as the case here.

It has long been recognized that if a private person for his own purpose acquires evidence from another, rightfully or wrongfully, finds and reports contraband that no violation of the person's Fourth Amendment rights has occurred. See, e.g. *Burdeau v. McDowell*, 256 U.S. 465 (1921). But if a federal official or government agent "had a hand" in the acquisition of the information, even by making a request that could be refused, it is sufficient governmental action to find a violation of one's Fourth Amendment rights. *Lustig v. U.S.*, 338 U.S. 74, 78 (1941); *Silverthorne, supra.* Thus, incursions made by private parties at governmental request are governmental incursions regardless of whether or not the private party could rightfully have done so in the absence of governmental request or influence. See, e.g. *Corngold v. United States*, 367 F.2d 1 9th Cir. 66, where an airline employee who searched luggage at police request was held an agent of the government in so doing, notwithstanding the fact that the contract of carriage reserved to the airline the right of inspection. See also *Stoner v. California*, 376 U.S. 483 (1964); *United States v. Jeffers*, 342 U.S. 48 (1951); *Byars v. United States*, 273 U.S. 28 (1927).

In *United States v. United Mine Workers*, 330 U.S. 258, 284-288 (1947), coalmine workers were found to be "employees" of the government within the meaning of an exception of the anti-injunction rule of the Norris La Guardia Act where the government had seized the coalmines pursuant to the War Labor Disputes Act and had required the miners to work without striking or facing civil and criminal sanctions.

This court has found it necessary to delineate between governmental and private action and in many cases, governmental involvement far less than outright coercion under civil and criminal penalties has been held sufficient to make constitutional guarantees applicable to nominal "private" behavior. In *Adickes v. Kress & Co.*, 398 U.S. 144 (1970) Mr. Justice Harland said for the court that ". . . settled practice of state officials may be opposing sanctions or withholding benefits, transform private predilections into compulsory rules of behavior no less than legislative pronouncements." Ids. *Id.* at 168. See e.g. *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

Here civil and criminal compulsion permeates the acquisition of documents which would not have otherwise been reproduced and retained or available for subpoena.

The result in the case *sub judice* is an acquisition of otherwise private documents without warrant, judicial supervision or notice and is wholly unreasonable in scope and ignores the basic probable cause requirements of the Fourth Amendment of the Constitution of the United States.

II.

THE GRAND JURY SUBPOENAS DUCES TECUM VIOLATED THE RESPONDENT'S FOURTH AMENDMENT RIGHT AND THEIR ISSUANCE AND USE CONSTITUTED AN ABUSE OF PROCESS.

The respondent would initially request that attention be given to the fact that the record does not demonstrate that the subpoenas in question were issued in blank by the District Court, but that this is merely a presumption on the part of the petitioner. Inspection of the subpoenas in question will show that they bear no more than a rubber stamp facsimile signature of the clerk and presumably they were completed in the United States Attorney's office. The agent testified that he secured the subpoenas in question from a secretary in the office and served them on the bank presidents in question. No notice of the service of the subpoenas was given to the respondent and four months later on the date of the hearing of the Motion to Supress, copies of the subpoenas, without the return completed as well as the material secured from the banks was still in the hands of the ATF agent.

A subpoena duces tecum which is too sweeping may violate the Fourth Amendment. (*Hale v. Henkel*, 201 U.S. 43 (1906); *Boyd, supra*. Further, subpoenas duces tecum cannot be used by the government to give color to an otherwise illegal search and seizure. *Silverthorne Lumber Company, supra; Wallace and Tiernan Company, supra.*

Here the procuring of subpoenas issued in blank and apparently completed in the United States Attorney's office on which no return was made to the grand jury

or to the court prior to the time of the hearing on the Motion to Supress as well as the retention by the agent of the microfilm copies of the respondent's records is a clear and patent avoidance of judicial scrutiny. As was said in *United States v. United States District Court*, 407 U.S. 297 (1973)

> "The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsiblity are to enforce the laws, to investigate, and to prosecute. . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech" *Id.*, at 317, 92 S.Ct., at 2136.

The petitioner contends that the necessity for approval of the subpoenas duces tecum by the grand jury, the courts or return of material secured by them would inconvenience the grand jury process. Here it is graphically demonstrated that one must presume that the agent and the United States Attorney's office is about the grand jury's work and that the potential for abuse of judicial process is substantial in this instance and in view of the existence of the bank secrecy act.

The legal process employed here is patently inadequate to protect the right of privacy of individual depositors as the banks themselves cannot be relied upon to assert the rights of their depositors with sufficient force or to notify them so that they may take steps to protect their own interest. The respondent

was never notified of the acquisition of the microfilmed copies of checks and bank records. It has also been recognized that banks have regularly afforded governmental agents informal access to customer's records without notifying the customer. See *California Banker's Association, supra,* 94 S.Ct. at 1534-1535 (Marshall, J. dissenting) See also *Bailin, Banks Ordinarily Cooperate with IRS on Tax Examination of Customers.* 14 J. Tax 220 (1961); 118 Cong. Rec. 10828-33 (Daily Ed. June 30, 1972) (remarks of Senator Tunney reporting results of survey conducted by ACLU). Further, there is obvious incentive on the part of banks to cooperate with the government rather than litigate to protect private interests of the customers in view of the substantial regulations applicable to the banking industry.

Nor should it be assumed that a bank can reasonably consent to the production of records and otherwise private papers and documents placed in their hands for their limited and confidential use when the recording and retention of the records otherwise returned to the depositor is compelled under the bank's secrecy act. Rather, there is a strong presumption that the owner or custodian of property may not consent to a search on behalf of a person with a protectable interest in the property. See, e.g. *Stoner v. California,* 376 U.S. 483 (1964); *Corngold, supra, Mancusi v. DeForte, supra.* Such consent must be proven by the government including proof that the depositor gave the bank complete and unrestricted freedom over his financial information or that he implicitly authorized another to consent to an invasion of his privacy. *Bumper v. North Carolina,* 391 U.S. 543 (1968); *Corngold, supra.* at 7.

Here the bank's compliance purported legal process without notice to the depositor effectively nullifies judicial review and is contrary to the rule that the reasonableness of a search should be determined by weighing the competing interest by a neutral magistrate. *United States v. United States District Court, supra;* Cf. *California Banker's Association v. Shultz,* 416 U.S. at 78 (Powell and Blackmon, JJ., concurring), 79 (Douglas, Brannon and Marshall, JJ. dissenting).

For these reasons, it is respectfully argued that the subpoena duces tecum issued, used and retained by agents and the United States Attorney's office constitutes an abuse of process amounting to nothing more than process for the prosecution and that the ruling of the court below is correct and should be affirmed.

III.

CONSIDERATIONS OF JUDICIARY INTEGRITY AS WELL AS DETERRENCE OF ILLEGAL INVASIONS OF PRIVACY AND ABUSE OF JUDICIAL PROCESS REQUIRE A RETRIAL OF RESPONDENT'S CASE.

Rejection of illegally seized and tainted evidence and a re-trial is demanded to insure judiciary integrity and protection of the people against unauthorized invasions of privacy. The petitioner presumes the existence of an independent source of the evidence and investigative leads acquired through the subpoenas in issue, but the record demonstrates no such independent basis for, it could not have been known whether any of the checks in question could be used as evidence of crime until after they had been acquired. The agents and the U.S.

Attorney's office had to acquire the copies of the checks and documents in question before they could determine their relevancy to the alleged investigation in question.

In *Terry v. Ohio* 392 U.S. 1 (1968) it was recognized that the exclusionary rule serves the imperative of judiciary integrity and that the rule is calculated to prevent rather than repair. "Its purpose is to deter–to compel respect for the constitutional guarantee in the only effectively available way – by removing the incentive to disregard it." *Id.* at 12-13.

The substantial personal right to privacy in one's papers and effects cannot in any way be more effectively protected than by the suppression of evidence derived from this unauthorized use of process and invasions of privacy.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals be affirmed and the Respondent have the re-trial as ordered.

Respectfully submitted,

D.L. RAMPEY, JR.
Nunn, Geiger, Rampey,
Buice & Harrington
P.O. Drawer 520
Warner Robins, Georgia 31093

Attorney for Respondent